



State of Wisconsin
Governor Tony Evers

Department of Agriculture, Trade and Consumer Protection
Secretary Randy Romanski

DATE: October 12, 2021

TO: Board of Agriculture, Trade and Consumer Protection

FROM: Randy Romanski, Secretary
Sara Walling, Administrator-Division of Agricultural Resource Management

SUBJECT: **ATCP 50: Soil and Water Resource Management Program**

PRESENTED BY: Lacey Cochart, Bureau Land and Water Resources

REQUESTED ACTION:

At the October 26, 2021, Board meeting, the Department will ask for the approval of the attached Statement of Scope (SS 081-21), regarding ch. ATCP 50 (Soil and Water Resource Management Program).

SUMMARY:

The first objective of the proposed rule is to consider options to implement the Silurian bedrock agricultural performance standard promulgated in 2018 by the Wisconsin Department of Natural Resources (DNR) in s. NR 151.075, Wis. Admin. Code, as authorized under s. 281.16(3), Wis. Stats.

The second objective of the proposed rule revision is to assess options to update, simplify, supplement, and clarify existing rule provisions. These provisions relate to implementing agricultural performance standards, soil and water conservation on farms, county soil and water programs, grants to counties and cost-sharing for landowners. Additional rule provisions establish standards for soil and water professionals and the standards for cost-shared practices.

The Governor approved the scope statement on September 13, 2021. The Joint Committee for Review of Administrative Rules directed the Department to hold a preliminary public hearing and comment period. The Department received Board approval of a notice of hearing for a preliminary public hearing on the scope statement at the September 23rd Board meeting. The hearing notice was published in the Wisconsin Administrative Register on September 27, 2021. The Department held a preliminary public hearing on September 30, 2021, pursuant to Wis. Stat. s. 227.136 (1), with a written comment period open through October 7, 2021. One person, representing Wisconsin Manufacturers and Commerce, attended the preliminary hearing and asked questions to 1) clarify that the proposed scope does not consider a nitrate performance standard, 2) ask about calculating the economic impact of any rule change, and 3) clarify the counties impacted by the Silurian bedrock performance standard. No written comments were received during the comment period.

Approval of a scope statement is the preliminary step in a lengthy process for enacting a permanent rule. If the Board approves the scope statement, the Department will draft a proposed permanent rule. As part of the rule-

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making effort, the Department will engage with a wide range of stakeholders over the next year, including county conservation department staff and committees, farmers and other landowners, farm-related business, such as suppliers, nutrient management planners, engineers and practitioners, and agricultural and environmental organizations. This stakeholder engagement process will enable in-depth discussion to ensure understanding and consideration of stakeholder viewpoints during rule drafting.

The Board will have at least two future opportunities to review the proposed rule after it is drafted. The Board must approve a hearing draft rule before DATCP may hold public hearings on the rule proposal. The Board must also approve the final draft rule before DATCP may adopt the rule. A proposed permanent rule can only take effect after the final draft receives approval from the DATCP Board and the Governor, and completes the legislative review process and is published.

STATEMENT OF SCOPE

Department of Agriculture, Trade and Consumer Protection

Rule No.: Ch. ATCP 50, Wis. Admin. Code (Existing)

Relating to: SOIL AND WATER RESOURCE MANAGEMENT PROGRAM

Rule Type: Permanent

1. Finding/nature of emergency (Emergency Rule only):

N/A

2. Detailed description of the objective of the proposed rule:

Objective No. 1 – Implementation of the Silurian Bedrock Agricultural Performance Standard

The first objective of the rule revision is to consider options to implement the Silurian bedrock agricultural performance standards promulgated in 2018 by the Wisconsin Department of Natural Resources (DNR) in s. NR 151.075, Wis. Admin. Code, as authorized under s. 281.16(3), Wis. Stats. The DNR and the Department of Agriculture, Trade and Consumer Protection (department) have distinct responsibilities in this rulemaking process. Under state law, the DNR establishes the agricultural performance standards and prohibitions necessary to limit nonpoint sources of pollution. The department, in turn, is expressly charged with prescribing conservation practices to implement the performance standards and prohibitions established by DNR in NR 151...

Implementation considerations for the Silurian bedrock agricultural performance standard, NR 151.075, may include identifying or prescribing conservation practices to meet performance standards and prohibitions developed by DNR as required under s. 281.16(3)(b).

The department is also expressly charged with developing and disseminating technical standards to implement the NR 151 performance standards and prohibitions. Specific technical standards, including DATCP 01 Verification of Depth to Bedrock, are expressly excluded from the definition of a rule under s. 227.01(13)(ys), but may be incorporated into rule by reference through the rulemaking process.

The proposed rule may also consider any applicable cost-sharing criteria for the practice standards and related technical standards.

This scope statement is not related to creation of a targeted agricultural performance standard for nitrates.

Objective No. 2 – Update, simplify, and clarify existing rule provisions

The second objective of the rule revision is to assess options to update, simplify, supplement, and clarify existing rule provisions related to implementing existing agricultural performance standards, soil and water conservation on farms, county soil and water programs, grants to

counties and cost-sharing for landowners, standards for soil and water professionals, and standards for cost-shared practices. The proposed rule may seek to do the following:

- Update language to simplify, fix errors, or reflect current practice
- Update definitions
- Update requirements for implementing farm conservation practices
- Update rates, landowner costs and other requirements related to cost-sharing for landowners
- Update or clarify cost-share eligibility from sources under s. 92.14 or any other source
- Update eligible costs for cost-share practices
- Add new cost-share practices
- Add new provisions related to statutory changes in grant and technical assistance programs and processes
- Adjust application requirements
- Adjust the requirements for the use of extended cost-share for landowners
- Update grant priorities to meet program goals and address statewide natural resource issues
- Update or clarify eligibility for and eligible use of grant funds
- Update standards for cost-share practices for consistency with current United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) technical guide standards
- Clarify and update requirements and eligibility related to engineering certification and nutrient management planners
- Clarify or revise compliance provisions related to the Farmland Preservation Program (FPP)
- Establish a process for developing a technical standard

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

The existing provisions in ch. ATCP 50, Wis. Admin. Code establish farm conservation practices to meet agricultural performance standards established in ch. NR 151, Wis. Admin. Code. The rule lays out eligibility and requirements for grants to support county land and water programs and cost-sharing for landowners. The rule identifies the conservation practice standards available to implement farm conservation practices.

The proposed rule may consider alternatives for technical and practice standards and the associated cost-sharing provisions available to farmers and other landowners to implement the Silurian bedrock agricultural performance standard.

The proposed rule also may examine existing policies in ch. ATCP 50, Wis. Admin. Code related to county soil and water programs. Potential updates will consider changes to grant requirements and priorities and may clarify and simplify contracting processes through local conservation programs. Possible rule changes may also clarify eligibility for and use of grant funding by entities other than county soil and water programs.

The proposed rule may include changes to rates, eligible costs and other requirements associated with identified standards for cost-shared practices. Updates may adjust requirements for implementing farm conservation practices and clarify cost-share eligibility based upon funding source.

Currently, the provisions in s. ATCP 50.16, Wis. Admin. Code establish requirements related to conservation standard compliance under the Farmland Preservation Program. The rule requires compliance with standards by landowners in order to participate in the program. County land and water conservation programs have responsibility for certifying and monitoring compliance. The proposed rule may clarify, simplify, or revise requirements for participation, inspection, certification and compliance monitoring.

Existing ch. ATCP 50, Wis. Admin. Code policies establish standards for certification and qualifications for soil and water professionals. The proposed rule may assess and seek to clarify and revise eligibility requirements for compatibility with current practice and expectations.

Rule changes may also establish a process for pursuing remedies for misleading actions and statements intentionally taken by select soil and water professionals. The proposed rule may assess existing standards for cost-shared practices for consistency with the NRCS technical guide standards in the field office technical guide. Consideration may be given to the addition of new standards for cost-shared practices. The proposed rule may establish a process for developing future technical standards to support s. Ch 281, Wis. Stats, and ch. ATCP 50, Wis. Admin. Code.

Analysis of Policy Alternatives:

If the department takes no action, the current rule will remain in effect. Without incorporation of technical standards and farm conservation practices to implement the Silurian bedrock agricultural performance standard in s. NR 151.075, Wis. Admin. Code and clarification of associated cost-sharing provisions, efforts to support farmers and landowners with compliance with state agricultural performance standards and prohibitions are limited.

Additionally, outdated or confusing provisions in the existing rule may continue to hinder efficient program administration. Conservation professionals and others who administer state conservation programs may be less able to respond to evolving resource concerns and may be limited in the services and cost-sharing they provide to landowners, farmers and producers. Landowners, farmers and producers may also lack access to the most effective conservation practices and necessary cost-share assistance to resolve existing resource concerns. Without action to address these resource concerns, state soil and water resources will continue to be degraded.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Authority to promulgate this rule is in multiple statutes, including:

- Ch. 281, Wis. Stats. Water and Sewage - enacted to protect and improve the quality of waters of the state
- Ch. 91, Wis. Stats. Farmland Preservation – establishes provisions requiring compliance with state soil and water conservation standards for program eligibility
- Ch. 92, Wis. Stats. Soil and Water Conservation and Animal Waste Management – establishes policy designed to address soil loss and water pollution

Chapter 281

- Wis. Stats. s. 281.16(3)(b): The department of agriculture, trade and consumer protection, in consultation with the department of natural resources, shall promulgate rules prescribing conservation practices to implement the performance standards and prohibitions under par. (a) and specifying a process for the development and

dissemination of technical standards to implement the performance standards and prohibitions under par. (a).

- Wis. Stats. 281.16(3)(c): Using the process specified under par. (b), the department of agriculture, trade and consumer protection shall develop and disseminate technical standards to implement the performance standards and prohibitions under par. (a).
- Wis. Stats. 281.16(3)(e): An owner or operator of an agricultural facility or practice that is in existence before October 14, 1997, may not be required by this state or a municipality to comply with the performance standards, prohibitions, conservation practices or technical standards under this subsection unless cost-sharing is available, under s. 92.14 or 281.65 or from any other source, to the owner or operator. For the purposes of this paragraph, sub. (4) and ss. 92.07 (2), 92.15 (4) and 823.08 (3) (c) 2., the department of natural resources shall promulgate rules that specify criteria for determining whether cost-sharing is available under s. 281.65 and the department of agriculture, trade and consumer protection shall promulgate rules that specify criteria for determining whether cost-sharing is available under s. 92.14 or from any other source. The rules may not allow a determination that cost-sharing is available to meet local regulations under s. 92.07 (2) or 92.15 that are consistent with or that exceed the performance standards, prohibitions, conservation practices or technical standards under this subsection unless the cost-sharing is at least 70 percent of the cost of compliance or is from 70 percent to 90 percent of the cost of compliance in cases of economic hardship, as defined in the rules.

Chapter 91

- Wis. Stats. 91.82(3): The department may promulgate rules prescribing procedures for the administration of this section by land conservation committees.

Chapter 92

- Wis. Stats. 92.05(3)(c): The department shall promulgate rules governing implementation of this chapter and distribution of state or federal funds by the department to the counties. The department shall comply with the procedures under s. 92.04 (3) in promulgating these rules.
- Wis. Stats. 92.05(3)(k): Nutrient management rules. The department shall promulgate rules to improve agricultural nutrient management in this state. The rules shall be consistent with rules promulgated under s. 281.16 (3) and shall include incentives, educational and outreach provisions and compliance requirements.
- Wis. Stats. 92.14(6)(k): The department shall identify by rule the types of cost-shared practices and the minimum grant amounts for cost-sharing grants that require any subsequent owner of the property to maintain the cost-shared practice for the life of the cost-shared practice, as determined by the department.
- Wis. Stats. 92.14(8): In consultation with the department of natural resources, the department shall promulgate rules to administer this section and the department's duties under s. 281.65.
- Wis. Stats. 92.18(1): The department shall, by rule, establish a program of training and certification for persons who review plans for, conduct inspections of or engage in activities under any of the following: (a) This chapter. (b) Section 281.65, if those activities relate to agricultural practices.

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

The department estimates that it will use 0.5 FTE to revise this rule. This anticipates time for investigation and analysis, rule drafting, preparing related documents, holding public hearings and communicating with affected persons and groups. The department will use existing staff to develop this rule.

6. List with description of all entities that may be affected by the proposed rule:

County Conservation Committees and Departments. The proposed rule may affect county conservation committees and departments and associated local conservation programs. Conservation staff will also be affected by any changes to standards for cost-share practices and may be affected by changes to the certification program for agricultural engineering practitioners.

Farmers and Other Landowners. Farmers and other landowners may be affected by changes to current farm conservation standards and requirements. Farmers and other landowners who accept cost-sharing through county conservation program may also be affected by rule changes.

Farm-Related Businesses. Farm supply organizations, nutrient management planners, soil testing laboratories, agricultural engineering practitioners, agricultural engineers, construction contractors and others who provide goods and services to farmers and other landowners may be affected by the proposed rule.

Users and Beneficiaries of Natural Resources: Communities, businesses including the tourist industry, and individuals may benefit from the proposed rule as the rule establishes conservation practices, supports county resource management programs, and provides cost-sharing to protect land and water resources.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

USDA-NRCS Conservation Practice Standards. NRCS adopts conservation practices standards. These standards contain information on the use of the practice and the minimum criteria when installing or implementing that practice to achieve the conservation purpose and ensure quality and consistency. Current department rules incorporate many NRCS conservation practice standards by reference.

For purposes of Wisconsin's soil and water conservation program, the department may incorporate NRCS standards as written or may modify the standards as appropriate. NRCS coordinates its Wisconsin standard-setting process with the department, DNR and others. The department tries to ensure that state standards are reasonably consistent with NRCS standards.

This rule may modify current department rule provisions that incorporate NRCS standards by reference. This rule may incorporate updated NRCS standards or may modify NRCS standards to make them more clear or workable in Wisconsin's soil and water conservation program.

Agricultural Engineering Practitioners; NRCS Job Approval Authority. NRCS provides job approval authority to agricultural engineering practitioners who design, install or approve agricultural engineering practices cost-shared by NRCS. The department has its own state program to certify practitioners who perform similar functions under department rules. Department rules are based on NRCS standards but include some modifications based on

Wisconsin program needs. The department works with NRCS and county land conservation departments to ensure that standards are reasonably consistent and meet federal, state and local needs.

Federal Conservation Funding. The USDA administers a number of federal programs that offer voluntary conservation incentives to farmers. The Environmental Quality Incentives Program (EQIP) is a key program offering cost-sharing for conservation improvements, including nutrient management plans, manure storage improvements and others.

Other programs, such as the Conservation Reserve Program (CRP) and the Conservation Reserve Enhancement Program (CREP) also provide cost-sharing and other incentives for conservation practices. The department attempts to coordinate state conservation funding programs with relevant federal programs.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

The overall economic impact to the state, to local governments and to small businesses from implementing revisions pursued through this process is expected to be low to moderate. Costs may vary from entity to entity and depend on each unique circumstance. Implementation is directly related to the amount of cost-share funds available for projects, so annual and overall economic impact coincide with cost-share funds available to county conservation departments to pursue landowner compliance.

There is the potential for impact on small business, namely to agricultural producers and supporting businesses, from proposed rule changes related to implementing the Silurian bedrock agricultural performance standard. This impact will be limited to farm operators in a targeted area of northeast Wisconsin who spread manure.

Under state law, compliance with the performance standards is not required for existing agricultural facilities unless cost sharing is made available for eligible costs. The state's ability to provide cost sharing is limited by the amount of funding made available through the state budget process.

The total costs will be determined by the cost to implement conservation practices to meet the Silurian bedrock agricultural performance standard and will be shared with state or local governments. In many cases, farmers are not required to implement the standards without cost-sharing. Additionally, the amount of cost-sharing available to farmers is limited by the amount of funding appropriated through the budget process. Farms that issued permits by DNR through the Wisconsin Pollutant Discharge Elimination System (WPDES) program are already required to meet the Silurian bedrock agricultural performance standards without cost-sharing.

The expected costs of changes related to implementing the Silurian bedrock performance standard are unknown and will be assessed during the rule-making process. Cost-share rates for current practices and the potential to establish new cost-share rates for conservation practices needed to implement the Silurian bedrock agricultural performance standard may be reviewed and established through this rulemaking process.

There may be an impact to small business statewide, namely to agricultural producers and supporting businesses, from changes other than those made to implement the Silurian bedrock agricultural performance standard. These changes may update, simplify, and clarify existing rule provisions related to implementing existing agricultural performance standards, soil and water conservation on farms, county soil and water programs, grants to counties and cost-sharing for

landowners, standards for soil and water professionals, and standards for cost-shared practices. The department will assess the costs associated with updating technical standards currently incorporated in the rule. These costs are also directly related to cost-share rates. The impact of any potential changes may affect costs associated with conservation practice implementation and will be shared by landowners and state and local governments.

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A handwritten signature in black ink that reads "Randy Romanski". The signature is written in a cursive, slightly slanted style.

Randy J. Romanski
Secretary-designee

8/20/21

Date Submitted